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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 23

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 1714–1734) is reported at 238 F. Supp. 528. The reports of the Commission (R. 979–1049; 1056–1107) are published at 321 I.C.C. 17 and 322 I.C.C. 491.

JURISDICTION

The judgment of the three-judge district court was entered on February 18, 1965 (R. 1755–1756). The notice of appeal was filed on April 16, 1965 (R. 1765–1768). Jurisdiction to review the district court's decision is conferred by 28 U.S.C. 1253 and 2101(b).

Baltimore & Ohio R. Co. v. *United States,* 298 U.S. 349; *New England Divisions Case,* 261 U.S. 184. Probable jurisdiction was noted on April 4, 1966 (R. 1769; 383 U.S. 964), and this appeal was consolidated with the appeal from the same judgment in *Chicago & North Western Ry. Co.* v. *Atchison, Topeka & S.F. Ry. Co.,* No. 8, this Term.[1]

QUESTION PRESENTED

Complaints filed with the Interstate Commerce Commission under Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) sought Commission determination of the lawfulness of agreements between more than 300 rail carriers apportioning among themselves revenues received from the transcontinental transportation of freight under joint rates. At the inception of the proceedings, the carriers voluntarily aligned themselves into three geographic groups, and presented evidence throughout on a group basis. After considering data and upon making findings relating to the three groups of carriers involved, the Commission determined that the existing arrangements for dividing such revenues were unlawful and prescribed new divisions.

The question presented is whether, in addition to the group findings thus made, the Commission was required to make individual findings with respect to the factors prescribed for consideration in Section

[1] A similar appeal was filed in *Baltimore & Ohio R. Co.* v. *Atchison, Topeka & S.F. Ry. Co.*, No. 143, 1965 Term, but, in light of subsequent settlements, the judgment below was vacated as to parties to that appeal and the cause remanded with instructions to dismiss as moot (383 U.S. 832, 833). See the discussion *infra*, pp. 20–21.

15(6) as to each of the 300 railroads involved, and was also required to find the specific amount in dollars of revenue needed by each carrier and carrier group to meet expenses and provide a fair return on railroad property, and the financial effect of the newly prescribed divisions in dollars as to each carrier and group of carriers.

STATUTES INVOLVED

Section 1(4) of the Interstate Commerce Act (49 U.S.C. 1(4)), and Section 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. 1007(b) and 1009(e)), are set forth in Appendix A to appellants' brief in the companion case, No. 8, this Term (hereinafter referred to as "C&NW Br.").

Primarily involved is Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), which provides:

> Whenever * * * the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential * * * the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance

to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

STATEMENT

1. INTRODUCTION

This case involves the apportionment or "division" among the respective rail carriers involved of revenues obtained from joint rates relating to transcontinental freight traffic. Transcontinental traffic is traffic moving in either direction between the East and the Midwest on the one hand and the Far West, known as Transcontinental territory, on the other. A joint rate is established when two or more carriers publish a single charge for their joint carriage of freight from an originating point on one line to a destination on another. The proportion or division of a joint rate received by each of the several carriers as its share of the revenue for the service is normally determined by agreements among the participating railroads. However, upon the complaint of dissatisfied carriers or upon its own initiative, the Interstate Commerce Commission is empowered by Congress (and has been since 1920) to prescribe new divisions, if it finds that the existing shares are "unjust, unreasonable, inequitable, or unduly preferential." That authority is contained in Section 15(6) of the Interstate Commerce Act.

By complaints filed in 1954, the power of the Commission was invoked to settle disputes with respect to existing divisions on all freight traffic moving between the Eastern and Transcontinental territories and between the Midwestern and Transcontinental territories.[2] The Eastern railroads filed a complaint against all railroads operating west of the gateways of Chicago, St. Louis, and Peoria which assailed the lawfulness of the primary divisions of joint rates on Eastern-Transcontinental traffic, alleging that the ex-

[2] Eastern (Official) territory lies east of Lake Michigan; Chicago and Peoria, Illinois; St. Louis, Missouri; and Cairo, Illinois; and north of the Ohio River, including West Virginia and most of Virginia. Midwestern territory lies between Eastern territory and points on the Mississippi River south of Cairo, Illinois, on the one hand, and Mountain-Pacific territory on the other. Mountain-Pacific territory includes the eleven Mountain-Pacific States except the southeastern corner of Wyoming, eastern Colorado, and eastern New Mexico; the eastern border of Mountain-Pacific territory is a line from El Paso, Texas, through Albuquerque, New Mexico; Pueblo and Denver, Colorado; Cheyenne, Wyoming; and then along the eastern boundaries of Wyoming and Montana. Transcontinental territory is the western part of Mountain-Pacific territory, and lies west of El Paso, Texas; Albuquerque, New Mexico; Ogden, Utah; and the western border of Montana. Traffic originating or terminating in Southern territory (east of the Mississippi River and south of Eastern territory) is not involved in this case; nor is traffic moving to or from points in Intermountain territory (the eastern part of Mountain-Pacific territory), except for certain traffic to or from points in Montana via the Twin Cities and other Northern gateways (R. 1038). Services performed by Mountain-Pacific carriers in moving traffic through Intermountain territory on its way to or from points in Transcontinental territory were covered by the divisions at issue, however (see C&NW Br. 8, n. 7).

A map of the United States showing the geographic areas and boundaries of these and other such "territories" is contained in Appendix B to appellants' brief in No. 8, this Term.

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isting divisions were unjust, unreasonable, and inequitable (R. 1–19). The roads west of these gateways are divided into two groups, the Midwestern roads and the Mountain-Pacific roads, the latter serving the West Coast. Shortly thereafter, the Midwestern railroads filed a similar complaint which attacked the divisions which they receive for their intermediate service on Eastern-Transcontinental traffic, and also challenged the primary divisions on Midwest-Transcontinental traffic (R. 31–46).[3] These complaints were consolidated into a single administrative proceeding before the Commission. In its report the Commission noted that the Midwestern lines' complaint constituted "one of the two major components of this litigation"

[3] The Midwest-Transcontinental divisions had their origins in the 19th century. These divisions were first established in 1874, and, as modified, have been in effect since 1925 without revision or Commission approval. The divisions were initially based on a constructive mileage proration, with the use of actual distances for the Midwestern lines and with distances over the lines of the Mountain-Pacific roads inflated by 50 percent in recognition of the pioneering service provided by these roads. For example, on a haul of 500 miles over Midwestern lines and 1,000 miles over Mountain-Pacific lines, the latter figure would be increased to 1,500 miles, and the carriers would divide the revenue on a 25/75-percent basis (500 and 1,500 miles) rather than on a 33/67-percent basis (500 and 1,000 miles). Over the years, these divisions were changed somewhat but the mileage inflation of the Mountain-Pacific roads was never entirely eliminated, and the promotional element in their divisions persisted at the time the complaints were filed. These Midwest-Transcontinental divisions were also used in determining the respective shares of the Eastern-Transcontinental joint rates received by the participating Midwestern and Mountain-Pacific carriers (R. 991). For a further discussion of the history of the Midwest-Transcontinental divisions, see C&NW Br. 9–10; for a description of the rather similar history of the Eastern-Transcontinental divisions, see the discussion in the Commission's initial report (R. 988–989).

(R. 982). As a result of the filing of these complaints, the lawfulness of the existing divisions affecting about 300 railroads in the East, Midwest, and far West was, for the first time, examined by the Commission.

Developments subsequent to the decisions of the Commission and the court below have narrowed the scope of the controversy—although the essential issues remain the same. As hereinafter discussed (*infra*, p. 20–21), the disputes between the Eastern and the Mountain-Pacific lines and between some of the Midwestern lines and the Mountain-Pacific lines were settled after entry of the judgment below and while the appeals from the district court's order enjoining the Commission's prescription of new divisions were pending in this Court. The controversy before this Court now involves only the validity of the Commission's prescription of divisions applicable to the nonsettling Midwestern and the Mountain-Pacific lines on Midwest-Transcontinental traffic and on Eastern-Transcontinental traffic.

2. PROCEEDINGS BEFORE THE COMMISSION

In the proceedings before the Commission, the 300 or more carriers which participate in the joint rates on transcontinental freight traffic voluntarily aligned themselves into three natural geographic carrier groups—Eastern, Midwestern, and Mountain-Pacific—and tried and submitted their cases on the basis of evidence as to groups. The Eastern and Midwestern carriers introduced evidence which sought to demonstrate the unfairness of the existing divisions between carriers in their groups and railroads in Mountain-Pacific territory. The Mountain-Pacific carriers

submitted group evidence in defense of the existing divisions, and contended, moreover, that they were entitled to an even larger share of the joint rates than they presently received.[4]

Nearly five and one-half years were required to complete the administrative proceedings. The Commission considered more than 800 exhibits containing direct testimony and in excess of 11,200 pages of testimony on cross-examination. Upon completion of the consolidated proceeding in 1963, the Commission found that the existing divisions violated Section 15(6) in that they unduly favored the Mountain-Pacific carriers by giving them a greater share of the revenues from joint rates than that to which they were entitled. Accordingly, the Commission prescribed new divisions which increase the share of joint rates for the Eastern and Midwestern carriers.

The Commission reached this conclusion after considering and making findings as to each of the criteria specified for "due consideration" in Section 15(6), as applied to each of the three contending railroad groups. It found that none of the groups is more or less efficiently operated than the others (R. 1030), and that there are no differences in the importance to

[4] Evidence considered by the Commission included detailed traffic studies based on actual movements (R. 983–987), individual carriers' revenue shares from transcontinental freight traffic in a representative year (R. 983–984; 987), specific divisions presently in effect (R. 988–991), elaborate cost studies "based in varying degrees on Rail Form A * * *" (R. 992), and extensive data on various, specific cost factors (R. 1010–1011). For a more extended discussion of the evidence introduced and considered by the Commission, see C&NW Br. 14–20.

the public of the service provided by the three carrier groups (R. 1032). It found, however, decisive differences in the relative costs of service of the three carrier groups, and in the revenue needs of the Eastern carriers as compared with those of the other two groups.

Based on relative costs of performing the service, the Commission found that the present divisions favored the Mountain-Pacific carriers "to an extent not justified by ascertainable cost differences" (R. 1032). As to the Midwestern lines specifically, the Commission stated that "our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low" (R. 1034).[5] The Commission's conclusions were grounded principally on data which showed that the revenues of the Mountain-Pacific carriers exceeded their out-of-pocket costs by 57 percent on Eastern-Transcontinental traffic, whereas the Midwestern and Eastern lines' revenues were only 43 and 22 percent greater, respectively, than their costs. With respect to Midwest-Transcontinental traffic, the Commission found that the Mountain-Pacific carriers were receiving revenues 71 percent above their costs, but that the revenues obtained by the Midwest carriers exceeded their costs by only 39 percent (R. 1011–1012). In addition, the Commission found that, on Midwest-Transcontinental traffic,

[5] Consistent with those findings, the Commission stated, in its supplemental report, that the "revenues of the eastern and midwestern lines derived from the present divisions are too low in relation to costs" (R. 1066).

the existing divisions gave the Mountain-Pacific carriers about 4.4 percentage points more than their share of the cost of furnishing the service, while the Midwestern roads obtained an amount correspondingly less (*ibid.*).[6] As to Eastern-Transcontinental traffic, it found that the Mountain-Pacific carriers were receiving at least 4.6 percentage points more than their share of the cost, while the Midwestern roads, which provide the intermediate service, received at least 0.3 percentage points less, and the Eastern roads at least 4.3 percentage points less, than their respective proportions of the cost of providing the service (*ibid.*).

In assessing the revenue needs of the respective groups of carriers, the Commission found that, viewed in the light most favorable to the Mountain-Pacific carriers, the average rate of return for the period 1946–1958, based on net railway operating income from all services, was 3.49 percent for the Midwestern group, 3.40 percent for the Eastern group and 4.64 percent for the Mountain-Pacific group (R. 1027; see also R. 1018–1020).[7] In addition, the Commission dis-

[6] Stated another way, the Midwestern lines incurred 31.5 percent of the total cost of handling the Midwest-Transcontinental traffic but received only 27.1 percent of the total revenue (R. 1009).

[7] These figures were based on actual valuation estimates, or the so-called "elements of value" ascertained from the Commission's valuation data (see R. 1018–1019; see also C&NW Br. 18). The Commission also noted that the average rate of return from all services during this period based on book investment was 3.26 percent for the Eastern lines and 3.34 percent for the Midwestern roads, compared with 3.89 percent for the Mountain-Pacific carriers (R. 1027). All percentage figures were adjusted for various income tax differences (see R. 1022–1023).

cussed the volume of freight transported by the respective groups during the years 1946–1958 as compared with the period 1923–1930, and found that the increases in such volume were significantly greater for the Mountain-Pacific carriers than for the other groups (R. 1016). Consideration of comparative figures relating to freight revenues received by the respective groups disclosed a similar trend (*ibid.*; see note 10, *infra*). Finally, the Commission observed that although the Mountain-Pacific lines had a smaller increase in net railway operating income from all services during the years 1950–1958, this was due primarily to heavy passenger deficits which obscured their favorable net railway operating income from freight service (R. 1023–1027; see R. 1077, and the discussion *infra*, pp. 15–16).

From this and all of the other pertinent evidence, the Commission concluded that "there should be increases in the [Eastern] divisions reflecting revenue need as well as cost," while stating that "the differences in earning power" between the Mountain-Pacific lines and the Midwestern lines "are less marked" than the differences between the earning power of the Eastern lines and the Mountain-Pacific lines (R. 1033–1034).[8] Considerations relating to relative costs of service and

[8] In rejecting the Midwestern lines' assertion that their revenue needs are greater than those of either of the other two groups, the Commission stated: "Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads" (R. 1029).

not revenue needs thus governed with regard to the prescribed increases of Midwestern, as distinguished from Eastern, divisions (see the discussion *supra*, pp. 46–47; R. 1032, 1034).

3. THE NEW DIVISIONS

Having found that the present divisions of the Eastern lines were too low when considered in light of costs and revenue needs, and those of the Midwestern lines too low in relation to costs, the Commission then considered the form and level of divisions it should prescribe for the future. For the primary Eastern-Transcontinental divisions, the Commission retained, with some modifications, the existing structure of percentage divisions as between geographical sub-areas in the East and in Transcontinental territory and simply adjusted the shares of the Eastern carriers upward by varying amounts, averaging about 16 percent (R. 1078), "in recognition of the evidence relating to cost and revenue need * * *" (R. 1035–1036). In its supplemental report the Commission noted that the prescribed divisions would return to the Eastern roads "a share of the revenues slightly less than their share would have been in proportion to out-of-pocket costs * * *" (R. 1078).

For the Midwestern carriers' shares of the joint rates on Eastern-Transcontinental traffic and their primary divisions on Midwest-Transcontinental traffic, the Commission determined to prescribe divisional scales of prorating factors, an approach which neither group opposed, rather than specific percentages applied to sub-areas, in view of the less well-defined

sub-areas in the Midwest (R. 1038). Under this method, tables of integers arranged by mileage blocks (in 50-mile increments) are used to compute percentages for dividing the joint rates.[9] In choosing the particular scale prescribed—the so-called 29886 scale, adjusted to provide a 10-percent inflation over a mileage prorate basis for the Mountain-Pacific roads' divisional factors—the Commission adopted a structure which reflects a rate-scale foundation rather than a cost-scale foundation, stating that "it is reasonable to divide the rates to some extent in accordance with the way they are made * * *" (R. 1079). The Commission found that the new divisions "would produce moderate increases in some of the most important midwestern divisions" (R. 1039), which were "supported by the evidence concerning cost of service" (R. 1086).

In regard to the level of the new divisions, the Commission rejected the contention of the Mountain-Pacific lines that their divisions be generally increased rather than decreased. The Mountain-Pacific roads contended that because of the expanding economy of the far West, increased divisions were urgently needed in order to provide investment funds required for the construction of enlarged facilities. But the Com-

[9] If, for example, the haul for a road originating traffic in the Midwest were 900 miles and the haul for a road terminating the traffic in Transcontinental territory were 1,000 miles, the scale selected by the Commission prescribes 270 integers for the originating road, and 323 integers for the terminating road (R. 1047). Reduced to percentages, the Midwestern carrier would receive 46 percent $\left(\frac{270}{270 \text{ plus } 323}\right)$ and the Mountain-Pacific road 54 percent $\left(\frac{323}{270 \text{ plus } 323}\right)$ of the particular joint rate.

mission noted that "railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment," and that the Mountain-Pacific roads were in the same position as carriers in the other territorial groups in this regard (R. 1033). It further concluded that to increase the Mountain-Pacific lines' divisions would require the Midwestern roads, as well as the Eastern roads, "to absorb the greater part of the reductions in the interterritorial class rates to and from Mountain-Pacific territory approved by the Commission in 1955, based principally on improved economic and transportation conditions in that territory" (*ibid*). The Commission concluded that "[c]onsistency with [its] action in prescribing * * * class rates for mountain-Pacific territory higher than those in the rest of the country * * * makes it logical to provide a higher scale of divisional factors for that territory here, but a difference of more than 10 percent would not be justified in our opinion" (R. 1039).

4. THE COMMISSION'S SUPPLEMENTAL REPORT

In its supplemental report, issued in late 1963 and some nine months after the initial report and order, the Commission specifically considered some of the objections to its decision which formed the basis for the Mountain-Pacific lines' action in the court below and, indeed, the grounds for that court's reversal of the Commission's decision. In discussing the contention that a prescription of new divisons on the ground of revenue needs requires a determination of the amount of such needs and the financial effect of the

adjusted divisions in dollars, the Commission stated that its "prescription herein of just and equitable divisions for the future is in no sense a 'transfer' of money nor is it based solely on revenue needs" (R. 1067). Continuing, the Commission stated that "[t]here is no single yardstick or criterion which can be employed in determining fair divisions," since "[t]he question of what constitutes just and reasonable divisions involves the making of practical judgments and cannot be solved as though it were a mathematical problem" (*ibid.*). In addition, the Commission stated that "[t]here is no rule, statutory or otherwise, requiring that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions" (R. 1068). In this regard the Commission noted that "[i]n some proceedings of limited scope there may be evidence supporting a fairly accurate estimate of additional revenue which may result from increased divisions, but this has not been true of the larger interterritorial divisions cases, such as this [citing the *New England Divisions Case*]" (R. 1069).

In its initial report the Commission had considered and made findings on the returns of the carrier groups from all services and, in addition, from freight service, the latter excluding passenger deficits (R. 1023–1027). In its supplemental report the Commission considered the Mountain-Pacific lines' contention that their relatively larger passenger deficits had been improperly taken into account. It noted that

"[i]n numerous cases involving divisions the Commission has given consideration to unequal passenger operating ratios as bearing on the respective revenue needs of the contesting groups" (R. 1074). Thereafter, the Commission pointed out that it regarded differences in passenger deficits "as important in connection with the claimed revenue needs of the transcontinental defendants * * * ," and that such data also served to "refute the contention that controlling weight should be given to comparisons of net railway operating income from all services" for those several years "when the disparity in the passenger operating ratios of the eastern and western railroad groups reached its maximum" (R. 1075).[10]

In addressing itself to the Mountain-Pacific roads' criticism of the newly prescribed divisions, the Commission stated that "[i]n fixing such proportions it is the relative contribution of the parties, in terms of costs, that furnishes the initial indication of what is just and equitable among the carriers" (R. 1076).

[10] In further explanation of its reference to passenger deficits, and again showing the limited purpose for which that data was considered, the Commission noted that the evidence "disclosed that the trend in the earning power of the eastern roads as freight carriers since the end of World War II has been much less favorable than that of the western roads. Comparison of net railway operating income from all services, however, does not fully show that trend for the reason that the passenger operating ratios of the western roads in this period increased to a much greater extent than those of the eastern carriers" (R. 1077). In order to obtain an accurate picture of earning power trend among the respective groups, therefore, the Commission gave some consideration to the fact that differences in passenger operating ratios, presumably not permanent in nature, had an effect on the income figures for the period considered in comparing the groups. For a fuller discussion of this point, see C&NW Br. 61–66.

Continuing, the Commission noted that, in prescribing the adjusted divisions, the process employed was "one of practical judgment and not of mere mathematical computation" (R. 1077). As to the scales prescribed for calculating the Midwestern roads' divisions, the Commission noted that adjusted percentages were not used, in contrast to the approach adopted as to the Eastern lines' new divisions, "since the present midwestern groups are not well defined" (*ibid.*). In regard to its decision to prescribe rate-based rather than cost-based scales, the Commission pointed out that "the construction of a divisional scale is [not] primarily a matter of costs and mathematics," and that it had "in the past employed rate scales as a suitable foundation for constructing divisional scales to divide joint rates in proportions [deemed] proper under the evidence" (R. 1078–1079).

5. PROCEEDINGS BEFORE THE DISTRICT COURT

In June 1963, the Mountain-Pacific group brought the instant suit before a three-judge district court in the Southern District of California to enjoin the enforcement of and to set aside the Commission's orders prescribing new divisions on transcontinental traffic. The Midwestern and Eastern lines intervened as defendants, and, together with the government, defended the orders. After oral argument, the court concluded that the Commission had misconstrued and misapplied Section 15(6) of the Interstate Commerce Act,[11] and set aside the Commission's orders.

[11] Early in its opinion the court below itself stated that "[t]he interpretation of Section 15(6) is the subject of the major dispute in the instant case" (R. 1718).

In the view of the district court, the Commission was required not merely to make Section 15(6) findings, as to each of the factors prescribed for consideration by that section, for each group of carriers, but also to make findings for each individual carrier involved in the proceeding. In addition, the court held that the Commission was required to find the revenue needs of each carrier and group of carriers "in terms of dollars." Finally, the court below concluded that the statute also required Commission findings, again in dollars and with respect to each individual carrier as well as groups of carriers, as to the financial effect of the newly prescribed divisions, *i.e.*, the amount of revenue which they would produce (R. 1724–1725; 1731).[12] In summarizing its holding, the district court stated:

> * * * [D]ivisions in rates of return are not equivalent to divisions in terms of dollars and

[12] The Mountain-Pacific lines argue in their Motion to Affirm that the district court also held that the Commission erred in reliance upon data which excluded passenger deficits. We do not so read the district court's opinion. But if that is a correct reading of the district court's opinion, then the court was mistaken, because the Commission in fact considered and relied upon rate of return figures based upon the net railway operating income from all services (R. 1027). The Commission explicitly found that while the Mountain-Pacific railroads had had larger passenger deficits than either the Midwestern or Eastern roads, the Mountain-Pacific group nonetheless enjoyed the highest rate of return from all services, passenger and freight (see the discussion *supra*, pp. 15–16, of the Commission's characterization of the significance of the differences in passenger deficits in its supplemental report).

> * * * divisions so stated do not satisfy the requirements of the statutes involved * * *. The court further concludes that to comply with the provisions of the * * * Interstate Commerce and the Administrative Procedure Acts * * * the Commission is required to make affirmative findings which disclose that the requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups; that findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required * * * (R. 1732–1733).

The lower court set aside the Commission's orders and remanded the case for further proceedings consistent with its opinion, *i.e.*, for the Commission to make the additional findings it held were required under Section 15(6) (R. 1756). Pending appeal, however, the court stayed its judgment (R. 1759) and continued in effect its preliminary injunctions against enforcement of the Commission's orders (R. 1196–1200; 1259–1266). Accordingly, the existing divisions on Midwest-Transcontinental and Eastern-Transcontinental traffic were left in effect, subject to conditions in the preliminary injunctions requiring a financial settlement among the carriers back to the effective date of the Commission's orders (July 1, 1963), should the orders be sustained on appeal (*ibid.*).

6. THE SETTLEMENT AGREEMENTS PENDING APPEAL

The government and the Eastern and Midwestern groups of railroads filed separate appeals to this Court. Subsequently, all of the Eastern lines and certain Midwestern lines, subsidiaries or associates of the Mountain-Pacific lines, entered into separate agreements with the Mountain-Pacific group settling their disputes by agreeing to divisions on transcontinental traffic higher than those which the Commission sought to correct, but somewhat lower than the Commission had prescribed.[13] The Commission then granted petitions by the settling carriers to vacate portions of its orders insofar as they prescribed divisions covered by the settlement agreements. Thereafter, upon consideration of memoranda of the settling railroads, this Court, by orders of April 4 and June 20, 1966 (383 U.S. 832; 384 U.S. 888), vacated the judgment of the district court with respect to the divisions of the Eastern and certain Midwestern lines and remanded those portions of the appeals to the district court with instructions to dismiss as moot.

As a result of these settlements and the ensuing dismissals, the number of railroads interested in these appeals has been reduced from about 300 to slightly more than 100 and this Court no longer has before it certain aspects of the Commission's decision. There is no present controversy as to the validity of that part of the Commission's orders prescribing new

[13] Appellants in No. 8, this Term, the companion case, comprise the major Midwestern roads and were not parties to the settlement agreements.

divisions—in terms of specific, adjusted group percentages—for Eastern-Transcontinental traffic, nor with respect to the adequacy of the findings in support of those divisions. Remaining before this Court in these two appeals is the validity of the Commission's orders, and related findings, insofar as the Commission determined that the existing divisions applicable to the Midwestern and Mountain-Pacific roads on Midwest-Transcontinental traffic and on Eastern-Transcontinental traffic were unlawful, and prescribed new divisions of the joint rates applicable to such traffic for the future, as "just, reasonable, and equitable" under Section 15(6).

SUMMARY OF ARGUMENT

I. Under Section 15(6) of the Interstate Commerce Act, Congress has imposed upon the Interstate Commerce Commission the duty to assure just, reasonable, and equitable divisions of joint rates as between connecting rail carriers. Exercising this authority, after consideration of data and upon making findings relating to the three geographic groups of carriers involved, the Commission prescribed new divisions of joint rates for the more than 300 carriers participating in the transportation of transcontinental freight traffic. The district court held, however, that the Commission was required to make findings with respect to each factor listed in Section 15(6), "not only as to the groups of roads involved but with respect to each carrier affected in said groups."

When a large number of carriers in an interterritorial divisions case have voluntarily associated themselves in groups in the presentation of their cases to

the Commission, this Court has expressly held that the Commission has authority to deal with the carriers on a group basis, and appraise and adjust divisions in a comprehensive manner without considering each carrier individually. *New England Divisions Case,* 261 U.S. 184. In so holding the Court rejected the view—erroneously adopted by the court below—that the Commission must consider and make findings as to each factor listed in Section 15(6) for every carrier involved. In *New England Divisions* this Court recognized that to require anything more than typical evidence as to the respective groups of carriers would be "tantamount to denying the possibility of granting relief" (*id.* at 197). Ever since this approval of a group approach in interterritorial divisions cases, the Commission has consistently handled large divisions proceedings on a group basis where, as here, no individual railroad asked for, or was shown to be entitled to, consideration apart from its group in order to avoid any individual injustice flowing from group consideration.

Nothing in the language of Section 15(6) expressly or impliedly prohibits the Commission from considering existing divisions and prescribing new divisions on a group basis. Use of a group approach in other appropriate regulatory contexts has been repeatedly sanctioned by this Court. And the detailed findings as to individual carriers required by the court below would have only limited utility. Not only must the attempt of the Mountain-Pacific roads to rewrite the lower court's holding, so as to require individual findings for only three carriers, fail; the argument that such roads

should have been accorded special treatment is itself without merit.

As a practical matter, a group approach in large, interterritorial divisions cases is virtually compelled. A requirement of individual findings as to each carrier would not only serve no significant regulatory purpose, but would seriously impede the decisional process and perhaps effectively frustrate the congressional purpose in giving the Commission the authority to adjust divisions.

II. Section 15(6) provides that in prescribing new divisions "due consideration" shall be given, among other things, to "the amount of revenue required to pay [the carriers'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." After making the basic determination that the Midwestern lines were not receiving a share of the divisions which fairly reflected their costs, the Commission found that this judgment should not be altered in light of the general revenue needs of the Midwestern or the Mountain-Pacific lines. The Commission considered the revenue needs of the carriers concerned by many indices, including the dollars of revenues derived and costs incurred in handling the involved traffic and the rates of return from all traffic.

The district court held that these findings of "revenue required," and specifically those cast in terms of relative rates of return, were inadequate because Section 15(6) requires the Commission to make findings "in terms of dollars" in measuring revenue needs, as

to individual carriers and group of carriers. Such a rule would deprive the Commission of the kind of customary and conventional yardstick which the financial world regards as most significant in comparing earning power and standing of railroads, either in groups or individually.

There is nothing in the statutory phrase "amount of revenue required," or in its legislative history, which expressly or impliedly suggests that the Commission's consideration must be confined to "dollars." Comparative rates of return have been consistently used by the Commission to measure revenue needs, with the apparent approval of both this Court and Congress. Section 15(6) plainly permits the Commission to consider the revenue needs of contending railroad groups in terms of a common denominator—rates of return—more meaningful than dollar figures.

III. Nor, under Section 15(6), must the Commission "also find the dollar amount of return to the carriers resulting from the new divisions," as required by the district court, for individual carriers and carrier groups. The statute does not use or imply the term "dollars" in specifying what the Commission must consider, and the Commission has consistently interpreted the Act as requiring no such findings of financial effect.

The individual changes prescribed were not designed to produce any specific increase or decrease in the revenue of any group of carriers or provide an amount of dollars to satisfy particular revenue needs. They were designed to produce "moderate increases" in some of the more important Midwestern divisions

in order to ameliorate the inequitable revenue-cost disparity in their divisions and to assure fair shares for all participating carriers. Since no carrier demonstrated that the impact of the new divisions would be unjust or unreasonable because of failure to yield operating expenses chargeable to the service performed plus a reasonable return on the property employed in that service, it would serve no useful regulatory purpose to require the Commission to find the precise differences in dollars between the revenue to be produced by the new divisions and the revenue received under the existing divisions.

IV. Selection by the Commission of rate-based divisional scales as the basis for the newly prescribed divisions is supported by rational findings. Prescription of a cost-based scale in a subsequent proceeding does not undermine the validity of the Commission's action in the instant case. In fact, the Mountain-Pacific carriers would have fared worse, rather than better, had the Commission predicated divisional scales upon costs.

V. The Commission's prescription of new divisions is based on findings adequately supported by substantial evidence and should be upheld. Divisions cases are essentially pragmatic in nature, and a considerable amount of discretion must necessarily be accorded to the Commission, and has in fact been given to it by Congress. Section 15(6) provides a flexible framework for Commission action in divisions cases, but by its very language indicates that the basic responsibility of the Commission is simply to prescribe "just, reasonable, and equitable" divisions.

As to disposition, although the district court did not specifically pass on certain issues raised before it, it indicated that in its view it would probably not be required to pass on such issues at a future time. Since the court below thus effectively disposed of all issues which it thought merited its consideration, and because of the present posture of the case and the long duration of the litigation, it would be appropriate for this Court to resolve the entire controversy once and for all. Remand to the district court would in no event appear to be necessary.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION IS REQUIRED TO MAKE INDIVIDUAL FINDINGS WITH RESPECT TO EACH FACTOR LISTED IN SECTION 15(6) FOR EVERY RAILROAD IN EACH GROUP, IN ADDITION TO THOSE FINDINGS MADE ON A GROUP BASIS

The district court held that the Commission must make findings as to each factor listed in Section 15(6), "not only as to the groups of roads involved but with respect to each carrier affected in said groups" (R. 1733).[14] Compliance with the district

[14] The court below also stated that the Commission erred in failing to find 'that the divisions are just, reasonable and equitable not only between the groups of carriers involved but also to each individual carrier in each division" (R. 1728). If the court meant that the Commission failed to make findings applicable to individual divisions of individual roads, then it misread the findings made, since the Commission prescribed divisions which would be lawful between all points and over all railroads before it. The court may be saying that the Commission must make a separate finding as to the lawfulness of each division of each carrier. If so, its holding is directly contrary to the *New England Divisions Case*, 261 U.S. 184, 202–

court's ruling would mean that, before the Commission could determine the unlawfulness of existing divisions and prescribe new divisions, it must investigate separately more than 300 rail carriers in detail to determine, in the words of the statute, "the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers * * *." This is a virtually impossible requirement.

Indeed, the railroads themselves never requested findings as detailed as those contemplated by the court below. The carriers voluntarily aligned themselves into three groups—Midwestern, Eastern, and Mountain-Pacific—at the beginning of the Commission proceedings, and remained so aligned throughout. Complaints were filed by the Midwestern and Eastern groups of roads, and the Mountain-Pacific lines, as a group, answered the complaints. Each group presented its case on behalf of all the carriers in that group by submitting evidence reflecting the criteria enumerated in Section 15(6) for the group as a whole, rather than for individual carriers. Finally, each of the three groups requested the Commission to prescribe identical divisions for all members of its particular group. Commission proce-

203; *United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 283; and *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74, 90.

dures, of course, permitted individual carriers to demonstrate that the conditions and circumstances surrounding their service were so different from other members of the group that the Commission should make special findings in order to avoid any individual injustice flowing from group-based consideration. Not a single carrier, however, sought to disassociate itself from the group which it originally selected by alleging and establishing the atypical nature of its operations.[15] Since the parties themselves presented their evidence on a group basis, it was hardly unexpected that the Commission would make findings relating to the respective groups, and prescribe new divisions based on these same carrier groupings.[16]

Contrary to the decision below, therefore, the railroads themselves wanted and expected the Commission to make findings in terms of groups, to adjust the divisions on a group basis and to apply the new divisions to each member of the respective groups. More importantly, the district court's sweeping requirement of individual findings for every carrier conflicts with the past decisions of this Court as well as Commission

[15] The Mountain-Pacific lines' Motion to Affirm urged that the Commission should have made special findings for three carriers whose situation was atypical of the other carriers in their group. However, none of the three alleged in the course of the Commission proceedings that they deserved individual treatment. See the discussion *infra*, pp. 40–45.

[16] It was not until after the Commission proceedings were terminated that the Mountain-Pacific carriers suggested that the Commission's order was invalid because the Commission neglected to make findings for each carrier.

practice. Moreover, the Commission plainly has the statutory authority to make findings on a group basis. Finally, Commission compliance with the decision of the lower court would serve no significant regulatory purpose, would seriously impair the Commission ability to administer large, interterritorial divisions proceedings effectively, and would therefore undermine the congressional purpose in enacting Section 15(6).

A. THE DECISION OF THE COURT BELOW IS CONTRARY TO PREVIOUS DECISIONS OF THIS COURT AND SETTLED COMMISSION PRACTICE

No one disputes that the leading decision of this Court construing the Commission's authority under Section 15(6) is the *New England Divisions Case,* 261 U.S. 184, the Court's first case involving that statutory provision, decided some three years after its enactment. In that case the Court held, in substance, that when carriers in an interterritorial divisions case associate themselves in groups in presenting their evidence to the Commission, the Commission may deal with them on a group basis. There the Commission had directed that the divisions of the several New England railroads of joint freight rates shared with carriers operating west of the Hudson River be increased by 15 percent, resulting in a corresponding decrease in the amounts to be received by the carriers operating west of the Hudson. In reaching that result, the Commission had not taken specific evidence or made a separate determination as to each division of each carrier, but had based its order on generalized

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evidence typical of the carrier groups.[17] This Court, recognizing the practical problems involved in administering Section 15(6) in a divisions case involving many carriers (there about 600), rejected the contention that the Commission must make findings not only for each group of carriers but for each individual carrier as well. Rather, the Court approved use of typical evidence in large divisions proceedings, "evidence which the Commission assumed was typical in character, and ample in quantity" to justify the divisions of rates involved (261 U.S. at 196–197).

In the *New England Divisions Case,* Mr. Justice Brandeis spoke for a unanimous Court in explaining why it is essential for the Commission to proceed on a group basis (261 U.S. at 197):

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. * * * To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief.

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[17] One of the dissenting commissioners in *New England Divisions* interpreted the statute as "requiring us to consider the requirements of one carrier as against another" (62 I.C.C. 513, 582). This view was rejected, however, by the entire Commission, and the district court (282 Fed. 306, 312–313), as well as this Court.

After reflecting upon the use of group findings in rate-making cases,[18] and drawing an analogy to the similar practical problems inherent in both types of proceedings, the Court concluded—correctly, we submit—that Congress intended the Commission to conduct divisions proceedings on a group basis as well. Thus, the Court observed (261 U.S. at 198–199):

> It was the actual necessities of procedure and administration which had led to the adoption of [the group] method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it.

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[18] The Commission first began dealing with carriers on a group basis in a rate-making proceeding, *Increased Rates, 1920*, 58 I.C.C. 220, conducted a year before the proceeding in *New England Divisions*. III–B Sharfman, *The Interstate Commerce Commission* 102 (1936). Sharfman notes that the first problem confronting the Commission in applying the statutory rule of rate-making (49 U.S.C. 15(1)) involved the determination as to whether rates should be adjusted for the carriers as a whole "or by rate groups or territories to be designated by the Commission, and if the latter, what rate groups or territories shall be so designated." The carriers and shippers agreed that a grouping of the roads was essential in view of the "wide differences in commercial and transportation conditions in different parts of the country," and they favored the designation of three major territories (East, South, and West). But because of "important differences of conditions prevailing in the eastern and in the western portions of the western district," the Commission modified the proposed groupings so as

Indeed, in *New England Divisions* Mr. Justice Brandeis discussed at length the close relationship between the statutory provisions conferring rate-making powers on the Commission and those relating to divisions. He described the latter provisions as an "integral" and "indispensable" part of the overall machinery for regulating railroads in the public interest (261 U.S. at 191).

Such a pragmatic and realistic approach in inter-

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to give separate treatment to carriers in the territory west of Colorado. As a result, "four groups of carriers were established for purposes of applying the rule of rate-making: Eastern, Southern, Western, and Mountain-Pacific" (*id.* at 103–104). This procedure was then adopted in the first major divisions proceeding conducted by the Commission, when, in 1921, the New England carriers complained that the shares accruing to them out of their joint freight rates as established in 1920 were too low. *New England Divisions*, 62 I.C.C. 513. Thereafter, the Commission has consistently conducted divisions proceedings on a group basis. See, *e.g.*, *Official-Southern Divisions*, 325 I.C.C. 1; *Akron, C. & Y. R. Co.* v. *Atchison, Topeka & S.F. Ry. Co.*, 316 I.C.C. 351; *Louisville & Nashville R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491; *Official-Southerwestern Divisions*, 287 I.C.C. 553, 289 I.C.C. 11; *Official-Southern Divisions*, 287 I.C.C. 497; *Official-Western Trunk Line Divisions*, 269 I.C.C. 765; *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175; *Southwestern-Official Divisions*, 234 I.C.C. 135. Rate cases are, of course, still handled on a group basis also, and as a practical matter must be so conducted. See, *e.g.*, *New York* v. *United States*, 331 U.S. 284. However, the sweeping language and holding of the district court, although construing Section 15(6), might raise into question even this eminently sound and sensible—indeed administratively indispensable—practice, and might also cast doubt on the validity of a group-based approach in other regulatory contexts. See the discussion *infra*, pp. 35–36.

preting Section 15(6), approved in *New England Divisions,* was subsequently reaffirmed by this Court in *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U.S. 74, 82, where it stated that the Commission "need not under all circumstances take specific evidence as to each rate of every carrier." The Commission was authorized to establish new divisions "upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate" (*id.* at 83). Subsequent decisions to the same effect include *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, and *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661 (D. Mass.), affirmed, 371 U.S. 26.

Ever since this Court approved the adjustment of divisions on a group basis in *New England Divisions,* the Commission has consistently prescribed new divisions without making separate findings as to each carrier. Its recent decision in *Official-Southern Divisions,* 325 I.C.C. 1, 50; 325 I.C.C. 449, 450, illustrates the procedure to be followed by a carrier which considers itself atypical and is desirous of specific findings. In that case the Norfolk-Southern Railroad expressly disassociated itself from the Southern group of carriers, presented its own evidence, and demonstrated to the Commission's satisfaction that its circumstances and conditions were sufficiently unlike those of the other Southern carriers as to merit individual treatment. The Commission responded to that showing by prescribing a special basis of divi-

sions covering traffic where the Norfolk-Southern is a participating carrier.[19] In rejecting the group approach used here to conduct a large, interterritorial divisions case, the district court thus disapproved a long-established Commission practice which this Court expressly sanctioned many years ago—a practice which, prior to the lower court's decision, had not been seriously questioned after *New England Divisions*.

Judicial and administrative construction and application of Section 15(6) aside, nothing in the language of the Interstate Commerce Act gives any substantial

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[19] In its supplemental report in *Official-Southern Divisions*, the Commission included a comprehensive statement of the general, underlying policy which it regards, under this Court's decisions, as applicable with respect to the situation of any assertedly atypical carrier in a large, interterritorial divisions case conducted on a group basis, stating (325 I.C.C. at 450):

"Since the enactment of section 15(6) as part of the Transportation Act of 1920, it has been our policy in interterritorial divisions cases to employ a group method or system of determining just, reasonable, and equitable divisions. Because of the number of carriers and the numerous rates and divisions involved, the actual necessities of procedure and administration have required the adoption of such a method in order to accomplish the task imposed upon the Commission by Congress. *New England Divisions Case*, 261 U.S. 184, 196–9 (1923). To avoid serious injustice to any carrier, our procedures permit any railroad to be excepted from a group order, in whole or in part, on a proper showing of differing circumstances. Where it is demonstrated by competent and reliable evidence that a carrier's financial or revenue needs situation requires the preservation of its share of the joint rates on the same level as presently existing or at a level different than that to be maintained for the group as a whole, we may provide special individual treatment in order to maintain such carrier as part of the Nation's transportation system without regard to its costs of rendering the service."

indication—one way or the other—about the Commission's authority to prescribe divisions on a group basis. The one thing that seems perfectly clear is that the statute does not prohibit such an approach. A study of the language of Section 15(6) discloses that the Commission is not expressly required to determine each carrier's share of joint rates individually; it specifies only that the divisions of rates to be received "by the several carriers" shall be just and reasonable. And there is no suggestion in the text that the criteria for measuring the justness of each division of each rate pertains to particular carriers rather than to groups of carriers.

Finally, the group approach pursued by the Commission is hardly novel. This Court has approved, under other statutes, governmental price regulation over industries providing services and commodities where the agency action has been conducted on a group or geographical basis.[20] Thus, in *Bowles* v.

[20] See, *e.g.*, *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 587 (authority of Interstate Commerce Commission under § 15(7) of Interstate Commerce Act (49 U.S.C. 15(7)) to fix rail rates on bituminous coal between producing areas in Indiana, etc. and destinations in northern Illinois, etc.); *New York* v. *United States*, 331 U.S. 284, 310 (authority of Interstate Commerce Commission under § 3(1) (49 U.S.C. 3(1)) to increase class rates on freight moving within the northeastern area of the United States and decrease class rates on certain other freight movements); *Bowles* v. *Willingham*, 321 U.S. 503, 518 (authority of Price Administrator to establish maximum rents under Emergency Price Control Act of 1942). Cf. also *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381 (power of Bituminous Coal Commission to impose tax on sales of such coal by producers); *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (authority of Agriculture Department to fix minimum

Willingham, 321 U.S. 503, 518–519, the Court, in the course of upholding the lawfulness of wartime rent control legislation authorizing the Price Administrator to fix, without advance hearing, rents that were "generally fair and equitable," stated:

> It is implicit in cases such as *Nebbia* v. *New York* * * * and *Sunshine Anthracite Coal Co.* v. *Adkins* * * * that high cost operators may be more seriously affected by price control than others. But it has never been thought that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis.

In sum, there is nothing in the statutory language to prevent the Commission from proceeding on a group basis in divisions cases, and, we submit, considered in context, and embellished by judicial interpretation, Section 15(6) plainly should be read as authorizing the Commission to utilize such an approach. That view is confirmed by the fact that the judicial and administrative gloss put on the statute over the years has never been repudiated by the legislative branch. In the four and a half decades since its enactment, Congress has not seen fit to make even the slightest modification in the language of Section 15(6).

B. REQUIRING FINDINGS ON AN INDIVIDUAL RAILROAD BASIS WOULD SERVE NO SIGNIFICANT REGULATORY PURPOSE

As the prior discussion shows, it was never contemplated that divisions should be fixed with the mathe-

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prices to be paid to producers for milk sold to dealers); *Nebbia* v. *New York*, 291 U.S. 502 (power of State to regulate price of milk).

matical precision for each carrier envisioned by the court below. In addition, it is clear that the detailed, individual findings required by the district court would have only limited utility.

On the basis of such individual findings as to each Section 15(6) factor for each carrier, the Commission might determine that certain carriers did not appropriately belong in the group with which they had aligned themselves, because their conditions were so different from other members of the particular group as to require individual treatment. As to this matter, however, Commission procedures enabled particularly aggrieved carriers to demonstrate that they warranted separate consideration. No carrier sought to make such a showing here. Individual findings for each carrier might also be used to ascertain if the situation of any particular carrier or carriers was so extreme—either greatly more or significantly less favorable than others in the group—that the group findings as a whole, grounded on group-based data, were distorted. Again, however, Commission procedures allowed the parties to make such a showing (see note 22, *infra*).

As a theoretical matter, a challenge to the composition of the groups or to the group-based evidence considered might result in the creation of new geographic groupings or in the prescription of specific divisions between every two connecting lines irrespective of the groups to which they have long belonged. Such an effort to achieve an ideal arrangement for dividing revenues from joint rates between each and every connecting carrier would make it impossible, however, for the Commission, as a practical matter, to

prescribe fair divisions generally (see the discussion *infra,* pp. 38–40). More realistically, any individual injustice flowing from group-based findings can be remedied by the carrier's request for consideration apart from its group (see *New England Divisions Case,* 261 U.S. at 199).[21]

In its opinion in *New England Divisions* the Commission itself noted that, if a group-based approach were not used in large, interterritorial divisions cases, "the law would in effect be nullified and the Commission reduced to a state of administrative paralysis" (66 I.C.C. at 203). Similarly, decisions of this Court in divisions cases have consistently recognized that Congress obviously "intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed" (*New England Divisions Case,* 261 U.S. at 197). Administrative proceedings would be virtually interminable if individual findings as to each Section 15(6) factor were required. Evidence submitted at an early point would be subject to a complaint that it had become stale and should be updated. And the results of such an approach, even if practicable, would be of little if any utility. As already pointed out (*supra,* p. 37), such a detailed, carrier-by-carrier consideration might show that a particular carrier was improperly aligned in a certain group or that the group-based data was distorted in

[21] In the last words of the Court in the *New England Divisions* opinion, "But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect" (261 U.S. at 204).

some way.[22] But these are matters which the individual carriers particularly involved can point out to the Commission, since they are obviously in the best position to know about their own situations. And the requirement that the Commission consider each carrier separately to ascertain such matters of limited utility would not only be unduly burdensome and inefficient, but would be of little help in determining whether the existing divisions were fair or the prescribed divisions just.[23] No significant regulatory

[22] In the Commission proceedings here the Mountain-Pacific lines contended that two roads, the New York Central and the Chicago & Northwestern, were inefficiently operated, and that their inclusion in their respective groups depressed the group-based figures as to rates of return. After consideration the Commission rejected this contention (R. 1020–1021; 1030).

[23] Unless divisions are generally prescribed on a group basis, they would often tend to defeat their purpose. If a particular carrier with a low rate of return (or revenue needs substantially above those of others in the group) were given higher divisions than its competitors who were better off financially, connecting carriers would obviously tend to deal with the competitor rather than the carrier with the higher divisions, since it would be to their financial advantage to do so (assuming, of course, that more than one carrier could provide the service, as is usually the case with respect to transcontinental traffic, and that shippers will not, as a practical matter, generally exercise their right, under Section 15(8), of designating the particular routing to be followed). The effect of such a tendency would be to take business away from the carrier with the greater financial needs, because of its higher divisions, and would thus further compound and complicate its financial problems, rather than help remedy them. Such a tendency would be somewhat restricted, however, by Section 3(4), which provides that carriers "shall not * * * unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

purpose would, in short, be served by requiring such findings. In addition, and perhaps more importantly, the purpose of Congress in conferring authority upon the Commission to adjust divisions might well be effectively frustrated by such an onerous requirement.[24]

C. THE MOUNTAIN-PACIFIC ROADS' MORE LIMITED ARGUMENT, AS TO THE COMMISSION FINDINGS REQUIRED UNDER THE DECISION BELOW, IS WITHOUT MERIT

Recoiling from the administrative chaos which would result from a requirement that the Commission make findings as to each Section 15(6) factor for each railroad before it, the Mountain-Pacific lines in their Motion to Affirm attempted to rewrite the district court's holding. Apparently, it is now their position that, under the decision below, the Commission need not make findings for each carrier, but only for three carriers, namely the Frisco, the Katy and the Rio Grande lines.[25] The district court, however, reached the very conclusion which had been urged

[24] As noted *supra*, p. 38, the way is still open to any carrier to apply to the Commission for modification of its orders if they are believed to operate unjustly in any significant respect. Apparently, the Mountain-Pacific lines maintain that such a course is not feasible because of the individual carriers' need for revenue in the interim. But their need is not demonstrably greater than that of those carriers who prevailed before the Commission in showing that the existing divisions were unfair and should be adjusted. Despite being involved in this controversy for almost 13 years, the non-settling Midwestern carriers have yet to realize any additional revenues from the disputed divisions.

[25] "Frisco" refers to the St. Louis-San Francisco Railway Company; "Katy" to the Missouri-Kansas-Texas Railroad Company; and "Rio Grande" to the Denver and Rio Grande Western Railroad Company.

upon it by the Mountain-Pacific lines.[26] Thus, although having asked the lower court to hold the Commission's orders invalid because of its failure to make individual findings for each and every carrier before it, the Mountain-Pacific lines appear now to maintain that the Commission's orders are invalid as a whole because of a failure to make findings as to only three of the carriers. At most, this narrower contention condemns the orders only as to those three roads. But the contention as to these three roads does not withstand analysis.[27]

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[26] In requested conclusion of law number 9, they asked the lower court to hold that the Commission had failed to make findings as to "the amount of revenue required by *individual carriers*, the financial effect of the new divisions upon *individual carriers*, and the extent to which the new divisions provide the amount of revenue required by *individual carriers* * * *" (R. 1513; emphasis added).

[27] How the Commission is to know, as an initial matter, which three, or five, or ten roads in a large, interterritorial divisions case should be accorded special treatment is rather difficult to determine. It seems quite fair, and wholly consistent with the *New England Divisions Case* and this Court's decision in other divisions cases, to require individual carriers who consider themselves atypical in certain significant respects—so that the typical evidence considered by the Commission when proceeding on a group basis would not accurately depict their particular situation—to come forward and request special consideration, pointing out the reasons for such a request (see the discussion *supra*, pp. 33–34; 37–39). Otherwise, no discernible line can feasibly be drawn between three and 300 carriers, and the Commission, in order to comply with the district court's decision, would be required to receive detailed evidence and make specific findings on each factor as to each carrier, or run the risk of its orders being overturned in an action brought by a dissatisfied participant in the proceeding. A carrier should not be allowed to proceed on a group basis until the Commission renders its determination, and then seek to except itself from the group with

During the course of the Commission proceedings, the Katy and the Frisco were active partners in the Midwestern group and the Rio Grande was a participating member of the Mountain-Pacific group. Each of the three carriers joined in presenting typical evidence which demonstrated the characteristics of the traffic, operations, economic conditions, costs, and geography in the areas served by the group with which it had associated. None of the three asserted that it was atypical. None presented evidence differentiating its individual situation from that of the group which it elected to join. The Katy and the Frisco requested the same treatment as other carriers operating in the Midwest, and the Rio Grande sought the same treatment as the other Mountain-Pacific carriers.

Based on the record built on this group approach, the Commission made findings for the railroads as groups and prescribed divisions on a group basis which were applicable to each member of the group with which it was associated.[28] Not until after the Commission entered group findings and prescribed group divisions did any carrier even suggest a desire for individual findings.

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which it has been aligned throughout if it does not agree with the Commission's result, except perhaps where there are unusual intervening circumstances. Having voluntarily aligned themselves into groups, it should be up to the individual carriers to seek such specific findings, or otherwise be bound by the findings grounded on a consideration of evidence introduced on a group basis.

[28] The scales of divisional factors prescribed within Mountain-Pacific territory and within Midwestern territory apply to each carrier operating in those territories for its service in those territories.

The Mountain-Pacific lines now assert that the Commission erred in failing to find the financial effect of its orders on the Rio Grande as an individual railroad. But to determine the effect of the prescribed divisions on the Rio Grande would have required the Commission to prescribe subdivisions within the Mountain-Pacific territory. The Mountain-Pacific lines, however, asked the Commission not to prescribe such subdivisions and the Commission acceded to that plea (R. 1080–1081). They cannot now claim as error an approach which they themselves urged upon the Commission. *United States v. Tucker Truck Lines,* 344 U.S. 33, 37. And it cannot be seriously contended that the Commission acted improperly in declining to prescribe such subdivisions in addition to primary, interterritorial divisions. As early as the *New England Divisions Case,* it was plainly established by this Court that the Commission was not required, under Section 15(6), to prescribe subdivisions as well as primary divisions of joint rates in a large, interterritorial divisions proceeding (261 U.S. at 201–202). This has been the consistent Commission practice ever since that decision.[29]

In addition, it is now contended that the Frisco and the Katy should have been accorded special treatment by the Commission. In the court below, these lines asserted inadequacies in the findings as to individual roads only with respect to the Section 15(6) efficiency criterion. At no time, however, was their present contention raised before the Commission, even though

[29] In any event, the Commission's orders permit the Rio Grande and its Mountain-Pacific connections to establish just and reasonable subdivisions of the prescribed divisions. For a more extended discussion of this point, see C&NW Br. 83–85.

they filed petitions for reconsideration and for rehearing. If the Frisco and the Katy contend that the Commission did not consider their claim that the Commission's prescription would cause reductions in their divisions, they are simply mistaken. That assertion was made to the Commission subsequent to the issuance of its initial report and order. After consideration of the petition of the Frisco and the Katy for reconsideration and further hearing, the Commission found the claims asserted without merit (R. 1091). The Commission recognized that the prescribed divisions would result in reductions in the amounts of revenue which these two lines received annually from transcontinental traffic and that this effect followed principally from reductions in their existing divisions on the hauling of lumber, which were high because of the desire of the Mountain-Pacific lines to maintain competitive routes via Kansas City. The Commission found that the Frisco and the Katy would have suffered reductions in some of these divisions under their own proposal, and that they were "not in a position to claim that the effect of our decision was a surprise," since the "situation to which the petitioners [Frisco and Katy] call attention was fully disclosed in the evidence of the midwestern lines and foreshadowed in the examiners' recommended report" (R. 1090–1091).[30]

[30] As to these three roads, then, the question is not, contrary to the view of the court below, whether they "have waived any objections to losses resulting from the new divisions" (R. 1732). Simply stated, having aligned themselves with groups and participated throughout the Commission proceeding as part of their respective groups—and not having sought individual findings for themselves—these roads should be bound by the Commission's decision. In regard to the Commission's treatment of the Frisco and the Katy, see also C&NW Br. 85–87, for a further discussion.

That the prescribed divisions will diminish the revenues of these two lines hardly shows, in itself, that the new divisions are unlawful. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 88–89.

As discussed *supra,* pp. 36–40, a group approach to large, interterritorial divisions cases not only has been approved by this Court and is authorized by Section 15(6)—such an approach is compelled as a practical matter. That this was recognized by the carriers, including the Rio Grande, the Frisco and the Katy, is indicated by the way in which they aligned themselves into groups and proceeded before the Commission on a group basis. A fair reading of the lower court's opinion shows that nothing short of individual findings on each Section 15(6) factor for each carrier would, in its view, have sufficed. In their attempt to rewrite that holding, therefore, the Mountain-Pacific lines must fail. And, as shown *supra,* pp. 40–45, even as to the three roads which the Mountain-Pacific carriers assert should have been accorded special treatment, their argument is without merit.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION MUST FIND THE REVENUE NEEDS OF EACH CARRIER AND CARRIER GROUP IN DOLLAR AMOUNTS

Section 15(6) provides that one of the factors to be considered by the Commission in determining the fairness of divisions is "the amount of revenue required to pay [the carriers'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." The statute does not, however, either expressly or impliedly demand that revenue needs be

determined in exact dollar amounts. In holding to the contrary, we submit, the district court erred.

The Commission carefully considered the revenue needs of the contending carrier groups without determining the exact amount of dollars which each group required. After finding that the Midwestern roads received less in revenues from the joint rates than the Mountain-Pacific roads in relationship to the cost of handling transcontinental traffic based on an analysis of the dollars of revenue received from the traffic in issue and the dollars of cost of handling that traffic, it turned to a consideration of the general revenue needs of the carrier groups. It observed that Mountain-Pacific territory had experienced rapid growth and economic development, and noted that the Mountain-Pacific State regulatory commissions had urged in *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, that this growth justified a reduction in class rates, although supporting increased divisions for the Mountain-Pacific carriers in the instant proceeding (R. 1015). It compared trends in net railway operating income from all services and rates of return on investment from all services (R. 1016–1023), resolving a number of important disputes among the three groups on the proper factors to use in measuring income, expenses, and investment from all services. It also compared passenger deficits and the revenues of the carriers from freight service, with particular reference to the Mountain-Pacific group's claim that the Mountain-Pacific roads had received no return on post-war increases in their investment. The Commission found that the increased investment

had been followed by commensurate increases in the Mountain-Pacific group's net railroad operating income from freight service, and that the slight decline in net operating income from all services was attributable to increases in the passenger deficits of the Mountain-Pacific railroads (R. 1023–1027). It rejected the claim of the Mountain-Pacific carriers that they were entitled to an increase in divisions in order to satisfy their needs for investment funds (R. 1033; see the discussion *supra*, pp. 10–11; 15–16).[31] The Commission also rejected the Midwestern lines' claim that their relatively greater revenue needs justified larger increases in the Midwestern divisions than those which it prescribed (R. 1035).

Thus, after making the basic determination that the Midwestern lines were not receiving a share of the divisions which fairly reflected their costs, the Commission also fully considered and found that this judgment should not be altered in light of the general revenue needs of the Midwestern or the Mountain-Pacific lines. However, the district court held that these findings of "revenue required," and specifically those cast in terms of comparisons of the rates of return

[31] That the amounts received by the Mountain-Pacific lines from transcontinental freight traffic accounts for almost one-half of their total freight revenues, while accounting for substantially smaller proportions of the revenues of the Eastern and Midwestern carriers (see R. 995; 1715–1716), was plainly taken into consideration by the rate of return figures used by the Commission in comparing the respective groups. That the Mountain-Pacific roads depend more heavily on these revenues than the other groups of carriers hardly justifies allowing them inflated divisions simply on that account.

of the three groups of carriers, were inadequate. It interpreted Section 15(6) to mean that the Commission must consider and make findings "in terms of dollars." In so concluding, the lower court ignored the dollar findings actually made, which showed in dollars the revenues derived from the involved traffic and the costs of handling that traffic. Its only explanation for this conclusion was stated in the following language (R. 1732–1733):

> Divisions in general, defendants urge, are made on the basis of "rate of return" figures which are equivalent to divisions in terms of dollars. The court concludes that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as they do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions.

It was not urged below that rates of return are "equivalent to divisions in terms of dollars."[32] It was, however, correctly pointed out that, in order to determine rates of return, it is initially necessary to ascertain operating revenues, expenses, taxes, and investment in dollars. This the Commission did. Dollar figures are plainly a necessary, intermediate step in

[32] What the court below meant in stating that rates of return "do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions" is difficult to determine. Neither did the Commission suggest, nor any party urge, that rates of return have any bearing on *all* Section 15(6) criteria.

arriving at a meaningful basis for comparing the revenue needs of various railroad groups. But standing alone, these figures mean very little. Only when they are converted into rates of return (by dividing operating revenues less operating expenses and taxes by investment less accrued depreciation and amortization) do they provide a common denominator which permits a direct comparison of the financial position of one railroad group with another. In short, compliance with the district court's holding that the Commission must make absolute "dollar" findings in measuring revenue needs would deprive the Commission of the kind of customary and conventional yardstick regarded by the financial world as most significant in comparing the relative earning power of either carrier groups or individual railroads—and of business enterprises generally.

There is nothing in the statutory terms "amount of revenue required" which either expressly or impliedly suggests that the Commission's consideration must be confined to "dollars." Nor is there any indication in the legislative history of Section 15(6) that the Congress intended to limit the Commission to consideration of "dollars" rather than the more meaningful rates of return. This method of using rates of return to measure relative revenue needs, rejected as invalid by the court below, has been consistently followed by the Commission[33] in divisions

[33] Contrary to the assertion of the Mountain-Pacific carriers in their Motion to Affirm, the Commission did not find in dollars, in its most recent interterritorial divisions case, *Official-Southern Divisions*, 325 I.C.C. 1, the amount of revenues re-

cases and has never been questioned by the courts.[34] Such usage has "that sanction of validity which is born of long administrative practice." *Interstate Commerce Commission* v. *New York, N.H. & H. R. Co.*, 287 U.S. 178, 190. And the fact that Congress has amended various sections of the Interstate Commerce Act referring to rates of return, subsequent to the establishment of the Commission's practice of using such figures to measure revenue needs in divisions cases, without amending Section 15(6) serves to indicate congressional approval of the Commission's interpretation of Section 15(6).[35]

In sum, no prohibition whatever against the Commission's use of rates of return—a meaningful com-

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quired by the contending carrier groups. In that case, as here, the Commission compared the rates of return of the respective groups for the purpose of ascertaining revenue needs (325 I.C.C. at 14–15).

[34] *E.g.*, *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 359–360; *Beaumont, S.L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 87. The Commission has also relied on rates of return in general territorial rate cases. Section 15a of the Interstate Commerce Act—the general rate-making provision—specifies that due consideration shall be given "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such [adequate and efficient] service" (49 U.S.C. 15a(2)). In *New York* v. *United States*, 331 U.S. 284, 348–349, this Court referred approvingly to the Commission's use of rates of return to compare the revenue needs of the geographic territories before it.

[35] Congress has amended related provisions of the Transportation Act of 1920 (which contained the language now comprising Section 15(6) of the Interstate Commerce Act) on at least three occasions without amending Section 15(6). In 1933, Congress eliminated the "recapture" clause of Section 15a (48 Stat. 220), and in 1940 and again in 1958, amended the rules relating to rate-making in Sections 15a (2) and (3) (54 Stat. 911–912; 72 Stat. 572). All three sections had made reference to rates of return.

mon denominator—as the basis for ascertaining the relative revenue needs of contending railroad groups exists. The district court was clearly wrong in holding that, before the Commission could conclude that the existing divisions improperly favored one group as against another, it had to determine revenue requirements in absolute dollar amounts.

III. THE DISTRICT COURT ERRED IN REQUIRING THE COMMISSION TO FIND THE EFFECT OF ITS ORDERS IN DOLLAR AMOUNTS

The district court further erred in holding that the Commission must find the financial effect of its orders "in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required * * *" (R. 1733), or "the dollar amount of return to the carriers resulting from the new divisions * * *" (R. 1724).

After the Commission determined that it was necessary to adjust the existing unlawful divisions, it prescribed new divisions, which it found would produce "moderate increases" in some of the most important Midwestern division (R. 1039). Its supplemental report reviewed the evidence which supported such increases (R. 1086). Contrary to the court below, the Commission clearly did not have to go further and determine the effect of its orders "in terms of dollars."

The new divisions prescribed by the Commission are not intended to produce any specific increase in dollars for the Midwestern carriers, nor are they designed to decrease by any exact amount the dollars

to be received by the Mountain-Pacific roads. Nor are they directed toward reflecting any revenue needs of the Midwestern group greater than those of any other group. Rather, the "moderate increases" in the Midwestern divisions are designed to ameliorate the inequitable revenue-cost relationship of the Midwestern carriers, as compared with the Mountain-Pacific roads, and to insure, insofar as possible, fairness and equity as between the participating carriers in dividing the revenues from joint rates. Indeed, the Commission expressly found that the prescribed divisions would accomplish that purpose, since the ordered "increases were supported by the evidence concerning cost of service * * *" (R. 1086). But the Commission specifically noted that the Midwestern lines' proposal for greater increases "gave undue weight to their claimed revenue need" (*ibid.*).

Section 15(6) of the Interstate Commerce Act contains no express requirement that the Commission ascertain the dollar effect of its prescribed divisions, and the Commission has never considered that such findings were required. Thus, in 1929, in *Divisions of Freight Rates,* 156 I.C.C. 94, the Commission denied a petition for rehearing for the purpose of demonstrating the dollar effect of an interterritorial divisions order. The Commission there said that its purpose was to reflect the evidence, "whatever the revenue results might prove to be" (156 I.C.C. at 95).[36] The Commission's refusal to ascertain the dol-

[36] The Commission similarly refused to find the dollar effect of its order in *Official-Southern Divisions*, 289 I.C.C. 4, 5. However, when this proceeding was reopened, 325 I.C.C. 1, 50,

lar effect of its order there was upheld by the district court (*Beaumont, S.L. & W. R. Co.* v. *United States,* 36 F. 2d 789, 798 (W.D. Mo.)), and this Court affirmed the judgment sustaining the Commission's order without comment on this question (282 U.S. 74).

Briefly then, there never has been a rule requiring the Commission to measure in dollars the difference between existing and prescribed divisions. The adjustments made in the Midwest-Transcontinental divisions were not intended to produce any specific increase or decrease in the revenues of any carrier group or provide any certain amounts of dollars to satisfy particular revenue needs. Rather, they were designed only to narrow the revenue-cost disparity between the two groups under the existing divisions. There can be no real dispute that the prescribed divisions accomplish precisely that result. In fact, no individual carrier demonstrated that the impact of the new divisions would be unjust or unreasonable because of a failure to yield operating expenses chargeable to the service performed plus a reasonable return on the property employed in that service. Nor can it be contended that the divisions prescribed affect any carrier so adversely that they could reasonably be regarded as in any sense confiscatory. Under these circumstances, it would have served no useful

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the Commission prescribed a cost-based scale as requested by the contending parties; and the record automatically reflected the dollar differences between the existing and the prescribed divisions, simply as the mathematical result of applying the respective percentages of costs to the already ascertained total revenue figures.

regulatory purpose for the Commission to have ascertained the precise differences in dollars between the revenue to be produced by the new divisions and the revenue received under the existing divisions.

IV. THE FORM OF THE PRESCRIBED DIVISIONS IS SUPPORTED BY RATIONAL FINDINGS

In their Motion to Affirm, the Mountain-Pacific lines assert that the form of the divisions prescribed by the Commission is not supported by adequate findings.[37] More specifically, they challenge the form of the 29886 scale of divisional factors, saying that the 29886 scale is a distance-based scale which also contains a terminal service element, and cannot be supported on the basis of cost evidence. They further assert that in *Official-Southern Divisions,* 325 I.C.C. 1, the Commission adopted a cost-based scale rather than a rate-based scale, such as the 29886 scale prescribed in the instant case.[38]

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[37] In addition, the Mountain-Pacific lines apparently contend that the Commission's prescription of a minimum division of 15 percent, applicable to certain limited connections in southern Illinois and Indiana, was not based on adequate findings, and also that such an approach was repudiated in the *Official-Southern Divisions* case. To the contrary, the Commission's findings clearly show why it prescribed the 15-percent minimum for relatively short-haul carriers performing origin and destination service (R. 1036–1037). In reaching this conclusion, the Commission found support in past carrier practice of voluntarily agreeing to such a minimum and in previous Commission decisions, and stated that such a minimum was justified by the "increasingly burdensome terminal costs in recent years * * *" (R. 1036–1037). For a fuller discussion of this matter, see C&NW Br. 102–108.

[38] Although it is difficult to determine whether the court below disposed of these contentions, it is at least clear that the court did not adopt them (see R. 1732–1733).

The question of the kind of scale to prescribe—whether a cost-structured scale or a rate-structured scale, and if the latter, whether to use one of the scales currently in effect—was the subject of vigorous dispute in the proceedings before the Commission, with much evidence adduced in favor of one or another of several scales. There can be no doubt that the Commission, in basing the divisions scale here prescribed upon a rate-scale pattern, made the requisite findings and gave ample supporting reasons for its choice. Its discussion of this question extended over several paragraphs in both reports, with the Commission concluding that "it is reasonable to divide the rates to some extent in accordance with the way they are made" (R. 1079). Thus, it selected the rate-scale method and adopted the 29886 scale, revised to inflate Mountain-Pacific factors 10 percent, which was the rate-scale method most extensively discussed during the course of the proceedings.[39]

Nor does the fact that the Commission prescribed a cost-based scale in *Official-Southern Divisions*—a different case on a different record with different issues, and where the contending roads requested a cost-based scale—undermine the action of the Commission in the instant case. An attack on the particular kind

[39] The rate scale on which the 29886 divisions scale is patterned reflects an allowance for terminal service and for line-haul service, cost-oriented factors. It also reflects an allowance similar to a standby charge for the privilege of the use of facilities provided, a non-cost factor. The 29886 divisions scale was prescribed in 1953 in *Official-Southwestern Divisions*, 287 I.C.C. 553, involving joint rates between the East and a substantial portion of the Midwest. For a more extensive discussion of divisional scales and the specific scale here adopted, see C&NW Br. 87–101.

of scale selected by the Commission simply fails to recognize that any scale prescribed is nothing more than "a mechanical device or method for dividing the rates in the proportion warranted by the facts" (*Beaumont, S.L. & W. Ry. Co.* v. *United States*, 36 F. 2d 789, 799). In addition, even assuming some inconsistency in the approach taken by the Commission in these two cases, that would provide no ground for setting aside the earlier order.[40]

Finally, the Mountain-Pacific lines would have fared worse, not better, if the Commission had predicated divisional scales upon costs. Scales constructed on a cost basis would result in the Mountain-Pacific carriers receiving 57 percent of the total revenue for their hauls in Mountain-Pacific territory, with 43 percent going to the Midwestern carriers for their hauls in Midwestern territory. The scales actually prescribed by the Commission give the carriers in Mountain-Pacific territory 58 percent of the revenue and those in Midwestern territory only 42 percent.[41]

V. THE COMMISSION'S ORDERS PRESCRIBING NEW DIVISIONS ARE BASED ON ADEQUATE FINDINGS AND SHOULD BE UPHELD

In the preceding discussion we have considered those aspects of the district court's holding which we regard as significantly in error and have dealt with par-

[40] *E.g.*, *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 665–666; *Georgia Public Service Comm'n* v. *United States*, 283 U.S. 765, 775.

[41] For a discussion of how these percentages are derived, see C&NW Br. 70–71.

ticularized challenges to the adequacy of the Commission's findings. Under a proper view of Section 15(6), we submit, those findings provided an adequate basis for its prescription of new divisions. A more general consideration of the Commission's role in a large, interterritorial divisions case such as this supports the conclusion that the Commission's approach here was a proper one, and that the result which it reached should be upheld.

There is little need to discuss at length the long duration and inherent complexity of the proceedings conducted before the Commission. Almost 13 years have elapsed since the complaints were first filed, and the existing divisions at issue here still remain unadjusted. The printed record, in spite of its size, contains only a small part of the voluminous evidence submitted to and considered by the Commission. If the Commission is to be able to handle large divisions cases in an effective way, a large amount of administrative discretion must be accorded to the agency. So long as there is substantial evidence supporting its essential findings, and so long as there is a rational relationship between that evidence and the conclusions reached, the Commission's determination should be upheld. As noted in the earlier discussion, those requisites were plainly met in the instant case.

Assessing the fairness of existing divisions and, if appropriate, prescribing adjusted divisions are matters which are essentially pragmatic in nature. Divisions proceedings cannot be governed by mathematical niceties; the pertinent considerations are at best inexact and imprecise; there is no one-and-only correct

solution.[42] Congress plainly recognized this in enacting Section 15(6), and has implicitly approved of the way the Commission has administered its authority under the statute by leaving it unchanged since 1920. Indeed, the basic charge to the Commission in Section 15(6) is to prescribe "just, reasonable, and equitable divisions" whenever it is "of opinion" that the existing divisions "are or will be unjust, unreasonable, inequitable, or unduly preferential * * *." As succinctly stated by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 357, the purpose of the applicable statutory provisions "is to empower and require the commission to make divisions that colloquially may be said to be fair." Continuing, the Court stated (*id.* at 359):

> The commission alone is authorized to decide upon weight of evidence or significance of facts. There is no single test by which "just," "reasonable" or "equitable" divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act.

Concluding this particular discussion, the Court further stated (*id.* at 359–360):

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[42] See *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661, 675 (D. Mass.), affirmed, 371 U.S. 26.

> There is no requirement that the commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions.

Another aspect of the statutory language is of no little significance. Under Section 15(6) the Commission is charged with giving "due consideration, among other things," to the various factors there spelled out. As succinctly put by the district court in *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675, affirmed, 371 U.S. 26, " 'due consideration' is not the equivalent of 'primary consideration.' " In other words, the listed factors are intended to provide little more than a flexible framework for Commission appraisal of whether divisions are "just, reasonable, and equitable." All factors are relevant, but none are decisive. As noted by the lower court in the *Boston & Maine R.R.* case (*ibid.*):

> The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarly the function of the Commission.

And these stated factors are to be considered only "among other things," and along with "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater

or less proportion than another carrier * * *." It is difficult to conceive of Congess using language less dogmatic in character.[43] Rather, the plain purpose of Congress in giving the Commission such sweeping authority to assess and adjust divisions of joint rates under Section 15(6) was to have that agency represent and effectuate the public interest "in maintaining all essential parts of the transportation system in effective working condition * * *" (R. 1068). See *New England Divisions Case,* 261 U.S. 184, 191. Enactment of the Administrative Procedure Act in 1946 was not intended, in our view, to restrict the scope of the Commission's authority under Section 15(6) nor to overrule or qualify this Court's decisions upholding that authority.[44]

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[43] As stated by this Court in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U.S. 368, 381: "* * * [T]he question as to what is a proper division is one for the Commission's discretion, reviewable only for unreasonableness, departure from statutory standards, or lack of evidentiary support." See also *Boston & Maine R.R.* v. *United States*, *supra*, at 670–671.

[44] Both the Mountain-Pacific lines and the opinion of the lower court rely extensively on the decision in *Atchison, Topeka & S.F. Ry. Co.* v. *United States*, 225 F. Supp. 584 (D. Colo.). Without discussing at length the merits of that district court holding, it is enough to say that it is distinguishable from the instant case. Despite that court's rather lengthy discussion of the Commission's authority under Section 15(6), a careful reading of the opinion discloses that the Commission's order was there set aside principally on two grounds which are inapposite here. In substance, the court in that case found a lack of typical evidence as required by the *New England Divisions Case* and a failure by the Commission to consider all of the factors listed in Section 15(6), either for groups or individual carriers (225 F. Supp. at 607). No such deficiencies can seriously be or are in fact asserted in the instant case.

One final point, relating to disposition, should be mentioned. It is rather unclear whether the district court considered that it passed on all of the issues raised before it. In a somewhat curious passage, the lower court stated (R. 1733):

> The court has discussed a majority of issues 1 to 19 of the 30 issues involved, as submitted by the parties, and in view of the conclusions reached it is unnecessary to discuss issues 20 to 30. However, no inference is to be drawn that the court is of the opinion that the issues 20 to 30, or any other numbered issues not discussed in this opinion, are of the nature it would be required to decide should they be raised at some future time.

Issues 20 to 30 related primarily to the Commission's cost findings and certain evidentiary determinations made in regard to cost evidence. With respect to such matters, the court below stated (R. 1732):

> Plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider. Specific findings of the propriety of the use of information which the Commission, as experts in this field, considers to be sufficient and adequate re pertinent elements are not necessary. To require same would be to compel the Commission to justify each method and all facts considered in arriving at every factor involved in the making of new divisions.

In light of the above-quoted language, it would appear that, from the lower court's point of view, it had effectively disposed of all issues which it thought merited its consideration. Should this Court conclude that the court below erred, in our view it would be neither necessary nor expedient to remand the case to that court for further consideration with respect to any issues not specifically considered in its opinion. All of the essential questions which might be raised are presented in these appeals, and presumably the district court would, in light of its above-quoted statements, favor this Court's taking such an approach. Considering the long duration of this litigation and the interests of the parties involved in having it finally terminated, it would be appropriate, we suggest, for this Court to proceed to resolve the entire controversy once and for all, and not leave any matters remaining for consideration by the lower court.[45]

[45] If instead of simply reversing the district court's decision this Court should conclude that both the Commission and the court below erred in some respects, the appropriate result would, in our view, be to vacate the judgment below and remand the case to the Commission for whatever further proceedings this Court might find necessary, in accordance with the views stated in its opinion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted.

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